

HEARING DESIGNATION ORDER

Before the
Federal Communications Commission
Washington, D.C. 20554

Adopted: February 25, 1992; Released: March 10, 1992

By the Chief, Audio Services Division:

MM Docket No. 92-33¹

In re Applications of

CENTRAL FLORIDA EDUCATIONAL FOUNDATION, INC.
(hereafter "Central")
Channel 202C3
Union Park, Florida
File No. BPED-881207MA

BIBLE BROADCASTING NETWORK, INC.
(hereafter "BBN")
Channel 202C2
Conway, Florida
File No. BPED-890412MJ

PALM BAY PUBLIC RADIO, INC.
(hereafter "Palm")
Channel 203A
Mims, Florida
File No. BPED-891127MB

SOUTHWEST FLORIDA COMMUNITY RADIO, INC.
(hereafter "Southwest")
Channel 202C2
Conway, Florida
File No. BPED-891127MC

MIMS COMMUNITY RADIO, INC.
(hereafter "Mims")
Channel 202C1
Oak Hill, Florida
File No. BPED-891127MD

HISPANIC BROADCAST SYSTEM, INC.
(hereafter "Hispanic")
Channel 202C3
Lake Mary, Florida
File No. BPED-891128ME

For Construction Permit for a New
Noncommercial Educational FM Station

1. The Commission has before it the above-captioned mutually exclusive applications for a new, non-commercial, educational FM station.¹

2. *TV Channel 6 Interference.* On July 25, 1990, Florida Public Radio, Inc. (FPR) filed a Petition to Dismiss or Deny the applications of BBN, Southwest, and Hispanic alleging that their proposals would cause impermissible interference to Station WCPX-TV, Channel 6, Orlando, Florida, because they do not propose to collocate their antennas on the WCPX-TV tower. FPR urges that each of the applicants should conduct an interference study to predict the number of residences which would receive interference from the proposed facilities and that each should be required to obtain a corporate resolution from the licensee of WCPX-TV "irrevocably consent[ing]" to the applicant's technical proposal. Also on July 25, 1990, FPR filed a Petition to Dismiss or Deny the Central application, alleging that it did not contain a consent agreement from WCPX-TV.

3. Section 73.525 of the Commission's Rules requires new FM reserved band applicants to submit a written agreement with each affected TV Channel 6 station demonstrating the latter's concurrence with the proposed FM facilities, or else demonstrate that the predicted interference area resulting from the proposal contains no more than 3,000 persons.

4. In assessing the merits of FPR's petition to deny, a two-step analysis is required under Section 309(d)(1) and (2) of the Communications Act. The first test is whether a *prima facie* case has been made. If so, we next consider whether there is a substantial and material question of fact to warrant further inquiry. We find that FPR has not made a *prima facie* case but, even if it had, our review of FPR's petition in light of the responsive pleadings indicates there is no substantial and material question regarding the applicants' compliance with 47 C.F.R. § 73.525. First, in their applications as originally filed, BBN, Southwest, and Hispanic each submitted a copy of a letter from the Chief Engineer of WCPX-TV concurring in its technical proposal provided that the applicant cooperate and resolve all interference problems caused by the new station. On July 25, 1990, Central filed an amendment containing a letter from WCPX-TV agreeing in principal to allow Central to diplex onto the WCPX-TV antenna. FPR's petition fails to show *prima facie* that these various letters were unauthorized or were otherwise insufficient to prove concurrence by the television station. In any event, in response to the FPR petition's challenge to the adequacy of these letters: (a) BBN filed on August 22, 1990 a petition for leave to amend its application to change its transmitter site to now specify collocation on the WCPX-TV tower and diplexing on the WCPX-TV antenna, and to provide a letter from the Chief Engineer of WCPX-TV reaffirming its willingness to cooperate with

¹ Although the applications are apparently for five different communities, the interfering contour of each application overlaps the protected contour of at least one of the others. Since all the applications were timely filed and the grant of one would

effectively preclude the grant of others, they are mutually exclusive and must be consolidated for hearing. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

BBN; (b) Southwest opposed the FPR petition on August 22, 1990, attaching a letter from the WCPX-TV Vice President and General Manager, who reaffirmed that station's willingness to cooperate with Southwest and clarified that its Chief Engineer was indeed authorized to make technical decisions; on October 3, 1990, Southwest filed a petition for leave to amend to also propose collocation and diplexing with WCPX-TV and to demonstrate the latter's consent thereto; and (c) Hispanic opposed the FPR petition on August 22, 1990, providing a technical statement demonstrating that pursuant to the methodology set forth in 47 C.F.R. § 73.525(e) its proposal would not cause interference to WCPX-TV. In the light of these responses, we cannot find a substantial and material question of fact warranting further inquiry.

5. Furthermore, the petitions for leave to amend filed on August 22, 1990 by BBN and on October 3, 1990 by Southwest, although filed after the deadline for amending as a matter of right, see 47 C.F.R. § 73.3522(a)(2), demonstrate good cause; therefore, they will be granted and the amendments will be accepted, subject to the condition that any comparative upgrading resulting therefrom will be disallowed.

6. *Central and Hispanic*: Reclassified As C3. An engineering review of the Central application reveals that, although it applied as a Class C2 station, its 1 mV/m field strength contour extends only 37.6 kilometers, which is less than the Class C2 minimum of 39 kilometers. Similarly, Hispanic applied as a Class C2 station, although its 1 mV/m field strength contour extends only 36.5 kilometers. Accordingly, the Central and Hispanic applications have been reclassified as Class C3 stations. However, this change does not affect the acceptability for filing of these applications for noncommercial educational facilities.

7. *Radiofrequency Radiation*. Palm and Mims propose to locate their antennas on the existing WPGS(AM) tower. Both applicants note that a proposal exists to relocate the WPGS(AM) site as a condition of the proposed assignment of the station (File No. BAL-891019EB). However, that assignment application was dismissed on March 1, 1990, and, as of this date, no application has been filed requesting such a change. Regardless of whether the WPGS(AM) tower were to be moved, Palm and Mims must amend their respective applications to show compliance with 47 C.F.R. § 1.1307(b) after the radiofrequency radiation effects of the WPGS(AM) tower are included.² In addition, none of the applicants in this proceeding has addressed how it would protect workers, authorized access to the site, from levels of radiofrequency radiation in excess of the American National Standards Institute (ANSI) limit. Accordingly, each applicant must submit an amendment to its respective application which explains how its workers will be protected. Since the proposals of the applicants may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, the applicants are required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, the applicants will be required to file within 30 days of the release of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Di-

vision, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. See *Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the environmental assessments, that the respective proposals of the applicants will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted with respect to those particular applicants, and the presiding judge shall thereafter not consider the environmental effects of the respective proposals. See 47 C.F.R. § 1.1308(d).

8. *Time-Sharing*. None of the applicants have indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

9. *Amendments - §1.65*. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
BBN	August 16, 1990; September 7, 1990; November 7, 1990; December 21, 1990; January 16, 1991; February 15, 1991; April 5, 1991; May 3, 1991; June 17, 1991 (as supplemented on June 18, 1991); July 22, 1991; August 26, 1991; October 7, 1991; November 7, 1991; December 20, 1991; and January 17, 1992.
Southwest	May 6, 1991 (as supplemented on May 13, 1991).
Hispanic	February 5, 1991.

² The radiofrequency radiation study must include the distance from the base of the tower to any fence surrounding that

structure.

10. *Contingent Comparative Issue.* The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

11. *Comparative Coverage - Noncommercial.* Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

12. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to the above-mentioned applicants, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1.1319 of the Commission's Rules.

2. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That the petition to dismiss or deny filed on July 25, 1990 by FPR IS DENIED.

15. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, the applicants shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

16. IT IS FURTHER ORDERED, That, as discussed in paragraphs 5 and 9 above, the petitions for leave to amend filed by BBN, Southwest, and Hispanic ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated therein.

17. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau